other department of human knowledge, and therefore it is that we are the more encouraged to offer, in another article, a few familiar suggestions bearing upon that most interesting question, *what* a student should study, as well as *why* he should study it?

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THE DOCTRINE OF NATURAL ALLEGIANCE.

THE case of *Mackay* v. *Campbell*, decided in the District Court of the United States for the district of Oregon, in November 1871, was regarded by the bar of that district with considerable interest, because of its effect upon the political *status* of a numerous class of persons in Oregon and Washington territory. It was interesting also to the profession at large not less by reason of the novelty of the question involved than of the judicial ability displayed by his Honor Judge DEADY in the discussion of that question. And the case afterwards came before the country in a more prominent form, being made the occasion for additional legislation upon the subject of the citizenship of persons born between 1818 and 1846 within the territory which was jointly occupied during that period by the citizens of the United States and the subjects of Great Britain, under the treaty of October 20th 1818.

The facts in the case were agreed upon, and were, so far as they touched the main question decided, as follows:—In 1823 Thomas Mackay, the father of the plaintiff, *a British subject*, was an employé of the Hudson Bay Company, a British corporation, at Fort George (now Astoria), Oregon, with his wife, who was a Chinook Indian woman; and in that year and at that place the plaintiff was born. Thomas Mackay continued in the service of the Hudson Bay Company until 1835, and the plaintiff himself was an employé of the company from his boyhood till some time subsequent to the treaty of June 1846 between the United States and Great Britain which definitely settled the boundaries between the two powers.

For five years prior to the general election held in Oregon in June 1870, the plaintiff resided in the precinct of East Dalles, in the county of Wasco, in that state, and was residing in that precinct on the day of the election. There being an election for

member of Congress, the plaintiff offered to vote for one of the candidates for that office, at the polling-place of East Dalles precinct, and his vote being challenged, he offered to take the oath prescribed by the statutes of Oregon to be administered by the judges of elections to persons whose votes are challenged. The judges, of whom the defendant was one, declined to administer the oath, and refused to take his vote, upon the ground that he was not an American citizen; and thereupon he brought his action in the United States District Court, to recover the penalty of $500 given by the second section of the Act of Congress, approved May 13th 1870 (16 Stat. at Large 140), commonly known as the act to enforce the XVth amendment to the Constitution. The defendant rested his case upon the proposition that, under the state of facts herein recited, the plaintiff was not a citizen of the United States, and therefore was not entitled to maintain his action. The judgment of the court was for the defendant, and was supported by an opinion in which the learned judge examined at length the question whether or not the plaintiff was, within the legal meaning of the terms, born "within the allegiance of the United States." The reasoning of the court will appear from the following extracts from the opinion:—

"Counsel maintains that the plaintiff was born in the allegiance of the United States, because he was born in its territory, and is therefore a citizen thereof, and was entitled to vote at such election. If the premises are admitted the conclusion follows. The rule of the common law upon this subject is plain and well settled, both in England and America. Except in the case of children of ambassadors, who are in theory born upon the soil of the sovereign whom the parent represents, a child born in the allegiance of the king, is born his subject, without reference to the political *status* or condition of its parents. Birth and allegiance go together: 1 Black. Com. 366; 2 Kent's Com. 39, 42; *Ingles* v. *The Sailor's Snug Harbor*, 3 Pet. 120; *United States* v. *Rhodes*, 1 Abb. U. S. Rep. 40; *Lynch* v. *Clarke*, and authorities there cited, 1 Sandf. Ch. 630.

"Counsel for defendant, while admitting the major premises of plaintiff's proposition—that any person born in the allegiance of the United States, is born a citizen thereof—disputes the minor one—that the plaintiff was so born—and insists that he was born in the allegiance of the crown of Great Britain; because the

British subjects in Oregon at the date of the plaintiff's birth, must be presumed to have occupied or dwelt in the country in pursuance of the treaty of joint occupation of June 15th 1846, and therefore *as* British subjects. Defendant's proposition concerning the allegiance in which plaintiff was born is based upon article 3 of the Convention of October 20th 1818, between the United States and Great Britain, which reads as follows:—

"'Art. 3. It is agreed that any country that may be claimed by either party on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbors, bays and creeks, and the navigation of all rivers within the same, *be free and open, for the term of ten years from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers*, it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of the said country; the only object of the high contracting parties in that respect being to prevent disputes and differences amongst themselves:' 8 Stat. 249.

"By the Convention of August 6th 1827, between the same parties, it was provided as follows:—

"'Art. 1. All the provisions of the 3d article of the Convention concluded between the United States of America and His Majesty, the king of the United Kingdoms of Great Britain and Ireland on the 20th of October 1818, shall be, and they are, hereby further indefinitely extended and continued in force, in the same manner as if all the provisions of the said article were herein specifically recited:' 8 Stat. 360.

"By article 2 of this Convention it is also agreed that either party to it may abrogate said article 3, on twelve months' notice to the other after October 20th 1828.

"On April 27th 1846, Congress passed a 'Joint resolution concerning the Oregon territory,' 9 Stat. 109, by which the President was authorized, 'at his discretion, to give the government of Great Britain the notice required' for the abrogation of said article 3. In the preamble of this resolution it is recited:—'And whereas it has now become desirable that the respective claims of the United States and Great Britain should be definitely settled, and *that said territory may no longer than need be remain*

subject to the evil consequences of the divided allegiance of its American and British population, and of the confusion and conflict of national jurisdictions, dangerous to the cherished peace and good understanding of the two countries.'

"This led to the Convention of June 15th 1846, 'In regard to limits westward of the Rocky Mountains,' 9 Stat. 869, by which the 49th parallel of north latitude was made the boundary between the two countries. In the preamble to this convention it is admitted and declared by the parties thereto,—'*that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory* on the north-west coast of America, lying westward of the Rocky or Stony Mountains, should be finally terminated by *an amicable compromise of the right mutually asserted by the two parties*, over the said territory.'

"The place of plaintiff's birth—Fort George—now is, and I suppose in contemplation of law from the American stand-point, was, at the date thereof, within the territory or realm of the United States. But as a matter of fact, the title to the country was then regarded as doubtful, unsettled and obscure; and this is apparent from the admissions above quoted from the respective preambles to the Resolution and Convention of April 27th and June 15th 1846. * * * *

"Under this state of things as to the title and occupancy of the country, and while his alien father is in the service of a British corporation, then exercising in the territory, by authority of the British Parliament, large municipal power, the plaintiff is born within the lines of a post then occupied by said corporation as a place of business and defence.

"This being so, in my judgment he was not born in the allegiance of the United States but in that of the British crown.

"The plaintiff, being the child of an unnaturalized alien, and unnaturalized himself, cannot claim to be an American citizen, except upon the single ground that *he was born upon the soil, and subject to the jurisdiction of the United States.* Nothing that has happened since his birth can add to or take away from the strength of his claim. The treaty of 1846 which definitely acknowledged the country south of the 49th parallel to belong to the United States, contains no provision naturalizing the British subjects living south of that line, who may elect to become American citizens by remaining there, or otherwise. The case turns upon the

single point—was the plaintiff born subject to the jurisdiction of the United States—under its allegiance?

"Suppose the government of the United States had undertaken to exercise jurisdiction over the plaintiff before the treaty of 1846, when for the first time it actually obtained exclusive jurisdiction over the country? Suppose it had attempted by means of laws applicable to American citizens under like circumstances, to draft or tax him? How natural and forcible would have been the objection:—'I am the child of a British father—a natural-born British subject. True, I was born in Oregon, but by a treaty stipulation the country was then and is now, for the time being, British soil as to a British subject. I was, therefore, born subject to the jurisdiction and in the allegiance of the king of Great Britain, and am as truly a British subject as though I had been born on the banks of the Thames.'

"When, in 1818, the two governments entered into the treaty of 'joint occupation,' as it has been aptly called, they thereby agreed that this then unsettled and unknown country might be occupied by the people of both nations—that it should 'be free and open' 'to the vessels, citizens and subjects of the two powers'—without either of them losing their nationality—changing their allegiance or passing beyond the jurisdiction and protection of their separate governments. As to the British subject and his children born here, the country was for the time being British soil, while to the American citizen and his offspring it was in the same sense American soil.

"Neither government was entitled to exercise any authority over the citizens or subjects of the other, or to assert the power and rights of a sovereign over them or their effects within this particular territory. If, prior to 1864, the plaintiff had died intestate and without heirs, leaving a large amount of personal property in the territory, there is no doubt but that the British Crown would have claimed the escheat without a word of objection from the government of the United States.

"When it is said that by the common law a person born of alien parents, and in the allegiance of the United States, is born a citizen thereof, it is necessarily understood that he is not only born on soil over which the United States has or claims jurisdiction, but that such jurisdiction for the time being is both actual

and exclusive, so that such person is in fact born within the power, protection and obedience of the United States.

"Generally speaking, the various places in the world are claimed or admitted, for the time being, to be under the exclusive jurisdiction of some particular sovereign or government, so that a person born at any one of them is without doubt born in the allegiance of such particular sovereign or government.

"But that is not this case, which, in this respect, is a singular one. Its parallel has not been found in the books. The country of the plaintiff's birth was, at the time thereof, jointly occupied by the citizens and subjects of two governments in pursuance of a treaty to that effect. Under the circumstances, neither government can be considered as exercising general exclusive jurisdiction over the country and its inhabitants. It seems to me that the only practical and just solution of the problem, is to consider the country for the time being, only to have been in the exclusive jurisdiction of each government as to its own citizens or subjects; and this is the view which Congress appears to have taken of the matter in 1846, when in the preamble to the resolution of April 27th, it deprecated 'the evil consequences of the divided allegiance of its American and British population,' and 'the confusion and conflict of national jurisdiction' growing out of the continued joint occupation of the country.

"A parallel case may hereafter arise out of the present joint occupation of the island of San Juan, at the head of the Straits of Fuca. It is well known that the title to this island is in dispute between the United States and Great Britain, and that in the meantime, in pursuance of an informal convention or understanding between the two governments, the island is occupied by the forces of each.

"Now, if hereafter the island is given up to the exclusive jurisdiction of the United States, and in the meantime a child of a British subject is born there within the portion occupied by the British forces, could it be considered as born in the allegiance of the United States? Certainly not. The child, although born on soil which is subsequently acknowledged to be the territory of the United States, was not at the time of its birth under the power or protection of the United States, and without these the mere *place* of birth cannot impose allegiance or confer citizenship.

"Chancellor KENT says (2 Com. 42), 'To create allegiance by birth, the party must be born not only within the territory, *but within the allegiance of the government.* If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law that during such hostile occupation of a territory, if the parents be adhering to the enemy as subjects *de facto*, their children born under such temporary dominion, are not born under the allegiance of the conquered.'

"For this latter clause, the author refers to *Calvin's Case*, note *c*, and quotes Lord COKE as saying, in that case, 'An alien is a person out of the ligeance of the king. It is not *extra regnum*, nor *extra legem*, but *extra ligeantiam.* To make a subject born, the parents must be under the actual obedience of the king, and *the place of birth be within the king's obedience*, as well as within his dominion."

"Now, in 1823, the plaintiff's 'place of birth'—Fort George—was no more within *the obedience* of the United States than is the 'Tower of London' to-day.

"In *Inglis* v. *The Sailor's Snug Harbor*, 3 Pet. 126, the Supreme Court, on a certificate of a difference of opinion from the Circuit Court for the Southern District of New York, held that as a general rule all persons born in the state of New York prior to July 4th 1776, were born British subjects, but might thereafter elect to remain so or not, and that all persons born therein after such date were born citizens of such state, but that Inglis, who was born a British subject in the city of New York after that date, and while the city was in the actual occupation of the British army, 'was born a British subject under the protection of the British government, and not under that of the state of New York, and of course owing no allegiance to the state of New York.'

"The necessary conclusion, from the rule announced in this case, is also that a person to be born in the allegiance of a particular government, must not only be born within its territory, but under its obedience, exclusive jurisdiction and power. Of course it matters not whether the exclusive jurisdiction of the United

States was excluded from the place of birth of this plaintiff by force of arms or by treaty with Great Britain. The result is the same in each case.

"Articles 14 and 15 of the Constitution, commonly called the Fourteenth and Fifteenth Amendments, have been cited by counsel for plaintiff as bearing upon this question of the plaintiff's citizenship and consequent right to vote.

"The latter simply provides that "the right of citizens of the United States to vote shall not be denied or abridged * * * on account of race, color or previous condition of servitude.'

"But as to who are 'citizens of the United States' this article is silent, it being understood that that matter had been regulated or defined by art. 14, sect. 1, which enacts: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.'

"Eliminate the words having reference to naturalized citizens and the clause reads: '*All persons born in the United States and subject to the jurisdiction thereof*, are citizens,' &c.

"This is nothing more than declaratory of the rule of the common law as above stated. To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also *be born subject to its jurisdiction*—that is, in its power and obedience.

"The only other construction of this clause that I can imagine possible is the following:

"Taken literally, it does not appear to require that the person should be *born* 'subject to the jurisdiction of the United States;' but if he was born within its territorial limits, whether under its jurisdiction or not, and afterwards becomes subject to such jurisdiction, he then, and so long as this *status* continues, becomes and remains a citizen of the United States. Assuming, as a matter of fact, that the plaintiff was born in the United States, although in the allegiance of the King of Great Britain, this construction of the Fourteenth Amendment would include him as a citizen, because he is now, and since 1846 has been, subject to the jurisdiction of the United States.

"But I think such construction fanciful and artificial. It is not to be presumed that the amendment was made to the Constitution to change the rule of the common law, but rather to declare and

enforce it uniformly throughout the United States and the several states, and especially in the case of the negro.

"Counsel for plaintiff, in reply to the fact that his client was born at a post under the flag of the Hudson Bay Company—a *quasi* public and political British corporation—endeavored, by citations from the state papers, to establish the fact, that in 1817 the British government only held Fort George (Astoria) as a captured place, and that about that time it was delivered up to the United States. Astoria was in fact delivered to the United States, in pursuance of Article I. of the Treaty of Ghent (8 Stat. 218) for the restoration of places captured during the war of 1812, on October 6th 1818: Cong. Globe, vol. 13, p. 218.

"But the fact, so far asthis action is concerned, is not material. It is not claimed that Fort George was held by the British government, at the time of plaintiff's birth therein, as a captured port or otherwise, but that it was *occupied* by a British corporation—British subjects—in pursuance of the treaty of joint occupation. It appears from the special verdict that the North-west Company obtained possession of the place in 1813, and that thereafter the same was in the exclusive occupation and control of said company until its union with the Hudson Bay Company in 1821, who thereafter occupied it exclusively until 1846.

"But I do not rest the conclusion—that the plaintiff was born in the allegiance of the King of Great Britain and not in that of the United States—on the fact that the plaintiff was born at a post of the Hudson Bay Company, rather than at any other point or place in the territory included in the treaty of joint occupation. It is admitted that the plaintiff's father was a British subject by birth, and while he lived in the territory—at least between 1818 and 1846—he was in the allegiance of the King of Great Britain, and his children, wherever born therein, were born in the same allegiance, and are British subjects.

"It was also urged by counsel for plaintiff, that both Alexander and Thomas McKay—the plaintiff's grandfather and father—came to Oregon before the treaty of 1818, and therefore were not settlers under it. The fact is admitted, but I think the conclusion both illogical and irrelevant. The treaty operated upon those who were in the territory when it went into effect, to the same extent that it did upon those who came afterward. It placed them equally under the allegiance of their respective sovereigns,

and limited them to the same use and occupation of the territory. It is immaterial whether plaintiff's ancestors came to the country or occupied it under the treaty or not. *They* were British subjects in any view of the matter, and if, when the plaintiff was born, the territory by reason of treaty was British soil as to British subjects, without doubt he was born one.

"Again, it being admitted by the special verdict that Alexander McKay joined the expedition of Astor as a partner in the so-called American Fur Company, and sailed from the American port of New York in the Tonquin, for the territory of Oregon, it is claimed that these facts show that the plaintiff's ancestors did not come to the country or occupy it under the treaty of joint occupation, and therefore the plaintiff was not born in the allegiance of the King of Great Britain.

"In the settlement of Oregon, Alexander McKay is a historical character. He was a British subject and a member of the North-west Fur Company. The new company which he formed in conjunction with Astor, and of which he was the principal partner, was substantially a company of Canadians, and British subjects. All the partners, except Astor, and three-fourths of the clerks and employees, were British subjects. McKay went from Montreal to New York *en route* to the mouth of the Columbia in a birch-bark canoe, transporting it on a wagon across the portages between the St. Lawrence and the Hudson. While at New York, there being then apprehensions of a war between the United States and Great Britain, McKay had an interview with the British minister for the purpose of getting his advice how to act in case of a rupture between the two nations, in which he represented that himself and associates were British subjects going to Columbia to trade under the American flag: North-west Coast of America, chap. I., Gabriel Franchere.

"I see nothing in these facts to cast doubt upon the conclusion that the plaintiff was born a British subject in the allegiance of the British crown. Alexander and Thomas McKay came to the country British subjects, and the mere fact that they embarked at an American port, and that the former was a partner in a fur company that called itself American for the convenience of trade or the exigencies of war, in no way affected their political *status* or that of the plaintiff"

It is not difficult to perceive how the principles involved in this

case might become a subject of controversy between the two nations themselves. Suppose the United States government, for example, adopting the view contended for on behalf of the plaintiff, should attempt to impose burdens upon persons similarly situated with this plaintiff, which it would not be lawful to impose upon British subjects sojourning in this country; suppose they should be required, as American citizens, to perform military service; or suppose the British government should exact from persons born in Oregon, but north of latitude 49 degrees, of American parents, during the joint occupancy under the treaty of 1818, services in the British army or navy, and should attempt to enforce the demand, there can scarcely be a doubt that in either of these cases the person upon whom such burdens were imposed would be able to secure the interposition of the government to which his parents were subject, and the end might cause a clash of arms between the two nations. The number of such persons now residing in both countries would seem to render complications of this nature by no means improbable.

We have regarded the decision in this case as giving to the Convention of 1818 its natural and legal interpretation, and we believe it was very generally concurred in by the profession, so far as its reasoning was examined by them. It is but the application of an old principle to a new state of facts—as indeed all judicial decisions are—and it was such an application as accords with the best and most reasonable views of the relations subsisting between the citizen or subject and the government. When the matter came under the notice of the Congress of the United States, that body perceived the necessity of legislation to meet the anomalous condition of persons situated as the plaintiff was, and, accepting the decision as correct, passed an act conferring upon all such persons the same rights of citizenship as are enjoyed by persons born elsewhere in the United States. But this act does not necessarily remove the question from the field of international law, for although it estops our government from saying such persons are not citizens, it does not conclude the individuals from insisting upon remaining British subjects. So the whole question may yet become a subject of diplomatic treatment.

W. L. Hill.